SUPREME COURT OF THE UNITED STATES.

THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE LONG ISLAND LOAN AND TRUST COMPANY, Executor of Charles R. Lynde, deceased,
Defendant in Error.

No. 195.

October Term, 1897.

Error to the Supreme Court of Ohio.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This action was commenced in the Common Pleas Court of Franklin County, Ohio. It was to foreclose a mortgage, known as the Parkhurst mortgage, to secure certain negotiable bonds, and resulted in a decree of foreclosure, which was affirmed by the Circuit Court, and afterwards by the Supreme Court of Ohio. (See opinion, R. 53.)

The defendant in error heretofore filed a motion to dismiss the cause for want of jurisdiction, which was postponed by this court until the hearing upon the merits. The briefs in support of the motion are among the files in the case.

No assignment of errors was made or returned with the writ under Rev. Stat. Sec. 997. No assignment of errors within the requirement of Rule 21 of this court, as we understand it, is made in the brief for plaintiff in error. (Deitsch v. Wiggins, 15 Wall. 539.)

The bill of exceptions taken in the trial court (R. p. 46, Fol. 76) is not brought to this court.

The only error argued in the brief filed for the plaintiff in error that can be supposed to present a Federal question is that the State court failed to give the effect claimed for it by the plaintiff in error to a decree of foreclosure and sale of the property rendered in a former action in the Circuit Court of the United States in favor of a subsequent mortgagee of the same property.

The record of the prior suit in the United States Circuit Court is not made a part of the record in this case. The finding of facts by the Court of Common Pleas of Franklin County in respect to the action in the Circuit Court of the United States contains no statement of the pleadings in the United States Circuit Court, or of the issues joined in that litigation, except the statement that they did "not affect the Parkhurst mortgage or the bonds thereby secured." (R. 34.)

Neither Parkhurst nor defendant in error's testator (Charles R. Lynde), nor any person representing him, was a party to the action in the United States Circuit Court. The decree of foreclosure in that case provided that the

property "should be sold subject to the outstanding sectional bonds prior in lien to the mortgage involved in that action, and to all other, if any, paramount liens thereon" (R. 36); and "that nothing in said decree contained should, in any manner, affect, prejudice or preclude the holders of said paramount liens, or any of them, but that said decree should be without prejudice to the right of them, and each of them."

The Common Pleas Court, after the finding of facts, stated its conclusions of law; among others, that the equities of the case were in favor of the plaintiff Lynde. The only exception taken by the plaintiff in error in the trial court was "to each and all of the conclusions of law the said defendant The P. C. C. & St. L. Ry. Co. then and there excepted" (R. 41). No motion for a new trial was filed in the trial court by the plaintiff in error.

The petition in error filed in the Circuit Court of Franklin County, Ohio, made no special reference to any error of the trial court in respect to the decree of foreclosure of the Circuit Court of the United States. (R. 47.)

The petition in error in the Supreme Court of Ohio failed to "specially set up or claim" any such error of the trial court or of the Circuit Court of Ohio. (R. 5.)

The Parkhurst bonds contained, among other things, the following provisions:

(R. 7.) "This bond shall be transferable by delivery, or it may be registered as to its ownership on a registry to be kept by the company, and, being so registered, it shall then be transferable only on the books of the company, until released from such registry on said books by its owner.

"This bond shall not be obligatory until it shall have been authenticated by a certificate annexed to it duly signed by the trustee."

The bonds were all, at the time of their date, signed and sealed by the corporation (R. 24), and were certified, in the manner provided, by Archibald Parkhurst, the trustee. They were placed by the maker in the custody of its President, B. E. Smith, who sold them, representing them to be his individual property. (R. 31.) Charles R. Lynde was a bona fide purchaser of the bonds, for value, before their maturity, and without notice of any defect in them, from a previous holder, who was likewise a bona fide purchaser, for value, without notice. They were all registered in the name of Charles R. Lynde at the company's registry in New York at the time of their purchase by him. (R. 37–39.)

The Supreme Court of Ohio held, as matter of law, that, upon these facts found by the trial court in respect to the execution of the bonds, and of the certificate by the trustee of the mortgage, they became a lien upon the mortgaged property from the date of the record of the mortgage, which was many years prior to the foreclosure proceedings in the United States Circuit Court. (R. 53.)

When the bonds in question were executed and certified by the trustee and delivered to the president of the mortgagor company, as stated, they remained in his possession until November, 1875, when, representing that he was individually the owner of said bonds, he negotiated them for value to bankers in Philadelphia, from whom they were afterwards acquired by Charles R. Lynde. (R. 37.)

On February 2, 1875, the trustees of the subsequent mortgage commenced the proceeding in the United States Court hereinbefore referred to for the foreclosue of said mortgage. On the same day receivers were appointed by that court to receive the rents and profits thereof from the

lessee in possession of the mortgaged premises. The receivers thereafter paid two of the coupons upon Mr. Lynde's bonds, and subsequently refused to pay any more. (R. 39.)

POINTS FOR DEFENDANT IN ERROR.

I. The record presents no Federal question that this court will review.

Oxley Stave Co. v. Butler County, 166 U. S. 648.
Fowler v. Lamson, 164 U. S. 252.
C. N. & W. Ry. Co. v. Chicago, 164 U. S. 454.

II. The decision of the State court is based upon an independent ground, not involving a Federal question, and broad enough to maintain its judgment. Wherefore this court has no jurisdiction.

Mo. Pac. Ry. Co. v. Fitzgerald, 160 U. S. 556.
Hammond v. Johnston, 142 U. S. 73.

III. It is well settled that a sale of real estate under judicial proceedings concludes no one who is not a party to those proceedings. As neither Archibald Parkhurst, as trustee, nor Charles R. Lynde was a party to the suit for the foreclosure of the subsequent mortgage in the United States Court, they remain unaffected by the proceedings or judgments in that case.

Telegraph Co. v. Deposit & Trust Co., 147 U. S. 431.
Embry v. Palmer, 107 U. S. 3.
Dupasseur v. Rochereau, 21 Wall. 130.

IV. The doctrine of *lis pendens* has no application to commercial paper; and no defense is allowed to anyone

against a mortgage to secure negotiable paper that is not a valid defense to the paper itself.

Carpenter v. Longan, 16 Wall. 271.

Sawyer v. Prickett, 19 Wall. 146, at p. 166.

C. Ry. Eq. Co. v. Bank, 136 U. S. 268, at p. 283.

Farmers' L. & T. Co. v. T. & S. H. R. Co., 54 Fed. Rep. 759.

V. The decree in the United States Court expressly provided that it should not affect prior mortgages or liens, one of which was the mortgage made to Parkhurst to secure one thousand bonds. The Supreme Court of Ohio rightly held that such a decree furnished no defense to this action. (Rec. pp. 36, 62–63.)

ARGUMENT.

I.

It is difficult to perceive how this court can determine the effect of the decree of foreclosure in the Circuit Court of the United States in the case of Roosevelt and Fosdick v. C. C. & I. C. Ry. Co., *et al.* None of the pleadings in that case are in the record. No evidence is presented to this court; no exceptions to any ruling presenting any Federal question; no error assigned in the State courts predicated upon any such ruling. True, there is a general exception to the conclusions of law of the trial court, upon the forty-seven findings of fact which were made. (R. 41.)

All this court can know about the issues, or the character of that litigation, is that it was an action for a foreclosure of a subsequent mortgage, but not affecting the Parkhurst mortgage or the bonds thereby secured; and that a cross

petition was filed, but asking no relief against the Parkhurst mortgage or the bonds secured thereby. (R. 34.) The Railway Co. and one Frederick R. Fowler were made defendants and served with process. The terms of the decree, to which we shall refer in another place, exempted the Parkhurst mortgage and the bonds secured thereby from any prejudice.

How is this court to ascertain what issues were adjudicated in that case, even as between the parties to the litigation? If we assume that the record of the case was before the State court, how is this court to find what matters were *res adjudicata* by virtue of the judgment in that case? For aught that appears, the Railway Co. that was a defendant, or some other party, may have set up that the entire issue of a thousand bonds secured by the Parkhurst mortgage were outstanding in the hands of bona fide owners for value. If this court is to construe the language of the fragment of the decree that is contained in the record it must have the pleadings before it for that purpose. It must appear affirmatively that a Federal question was raised; that it was presented for decision to the Supreme Court of Ohio; that it was decided adversely to the party complaining, and the facts to enable this court to review the decision must be set forth in the record. Nothing of the kind appears in this record.

In the case of Oxley Stave Co., *supra*, at pages 655, 656, this court says:

"The questions raised and decided in the State Circuit Court point altogether for their solution to the laws of the State, and make no reference whatever to the Constitution or laws of the United States. Undoubtedly this did not preclude the plaintiffs in error from raising the point

in the Supreme Court of the State, if it was involved in the case as presented to that court. And whether a writ of error from this court will lie or not depends upon the questions raised and decided in that court. But neither of the questions made there by the errors assigned refer in any manner to the Constitution or laws of the United States, except the third, and the language of that is too general and indefinite to come within the provisions of the Act of Congress, or the decisions of this court."

II.

It does affirmatively appear that the Supreme Court of Ohio, upon the facts found by the trial court in respect to the execution of the bonds and the certificate by the trustee of the mortgage, found that the bonds became a valid lien upon the property long prior to the proceedings in the Federal court. Say the court in its opinion, after quoting the provision of the deed recited in the bonds:

(R. 55.) "The statement that the bonds should not become obligatory until thus authenticated (by the trustee) is equivalent to a declaration that when duly executed by the company, and so authenticated, their obligatory character shall be complete. They then became perfect in form, and, by their express terms, transmissible by delivery."

And, again, upon page 65 of the record,

"The date of the lien of the bonds does not depend upon the date of their original negotiation. The entire series stand upon a footing of exact equality in this respect. The first one issued has no better or earlier lien than the last one. To distinguish between and give priority of lien among a series of railway or other bonds secured by the same mortgage, and in the hands of different bona fide

holders, according to the time each may have been issued, would contravene the manifest design of the maker."

Trust Co. v. Iron Works, 51 N. J. Eq. 605.

Clearly this construction of the force and effect of this provision in the bonds in question was warranted by the facts before the court. And this ruling of the Supreme Court of Ohio is independent of any Federal question sought to be raised upon this record; and it is broad enough to sustain the judgment of the State court irrespective of any such Federal question.

We respectfully submit that this ruling of the Supreme Court of Ohio is not subject to review by this court in accordance with its numerous decisions, of which the court, in the case of Mo. Pac. Ry. Co. v. Fitzgerald, *supra*, at page 576, says:

"1. We repeat what we said in California Powder Works v. Davis, 151 U. S. 389, 393, that 'it is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a state in which a decision could be had, it must appear affirmatively, not only that a Federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on independent ground, not involving a Federal question, and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any Federal question that may also have been presented.' Eustis v. Bolles, 150 U. S. 361, and cases cited."

III.

But this record also fails to show that either Mr. Parkhurst, the trustee, or Mr. Charles R. Lynde, or any party representing them, or either of them, was a party to the litigation in the Federal court.

It is true that the Supreme Court of Ohio in its opinion (R. 62) states that "the trustee in the mortgage last made and the trustee in the mortgage made to secure the bonds in controversy were each made parties" to this action in the Federal court. But, so far as the trustee of the bonds in controversy is concerned, this statement in the opinion of the Supreme Court of Ohio is an inadvertence. The finding of fact upon this subject is set forth upon page 34 of the record. And, of course, it is the record and not the opinion of the court that is conclusive as to this fact.

In the case of Telegraph Co. v. Deposit & Tr. Co., *supra*, this court decided, as stated in the syllabus, that

"A sale of real estate under judicial proceedings concludes no one who is not a party to those proceedings."

And, upon page 448 of the opinion, the court say:

"It is well settled that a sale of real estate under judicial proceedings concludes no one who is not a party to those proceedings. Neither the Rapid Co. nor the plaintiff was a party to the suit for the foreclosure of the mortgage of the Bankers' Co. Therefore, whatever title either of them had to the property which was attempted to be sold in that foreclosure suit remained unaffected by the suit. The same fact is true of the attempted sale in the Ohio proceeding, set up in the answer. Neither the Rapid Co.

nor the plaintiff was a party to that proceeding, and the attempted sale under it did not bar or impair their rights."

Of course there could be no controversy upon the proposition thus declared by this court. But the very basis of the doctrine upon this subject is laid down in the opinion delivered by Mr. Justice Matthews, in the case of Embry v. Palmer, 107 U. S. 3, in the following statement: (P. 8.)

"The jurisdiction of the court invoked by this writ of error is conferred by Sec. 709, Rev. Stat., it being a case in which a title or right is claimed under an authority exercised under the United States, and the decision of the State court being in denial of the title or right so asserted. It was decided in Dupasseur v. Rochereau, 21 Wall. 130, that such a question is undoubtedly raised whenever 'a State court refuses to give effect to the judgment of a court of the United States, *rendered upon a point in dispute, and with jurisdiction of the case and of the parties.*'"

(Italics ours.)

The same principle is applied in the elaborate opinion in the case of Dowell v. Applegate, 152 U. S. 337.

How then can it be said that any proceeding, or the final judgment, in a case to which Charles R. Lynde was not a party, can adjudicate or affect his rights? Or, how can it be said that any Federal question was raised by the refusal of a State court to give any effect against a litigant, to a judgment of any court of the United States in a case to which the litigant in the State court was neither a party nor a privy, and wherein he is not chargeable with either actual or constructive notice of the proceedings. In proceedings strictly *in rem* the whole world are deemed parties. But the foreclosure of a mortgage is not such a proceeding.

But it is urged by our adversaries that receivers were appointed in the case in the Federal court to take posses

sion of the property other than the road, and to collect the rents from the lessee of the road. The appointment of a receiver does not affect or divest existing liens in favor of persons not parties to the proceeding. They will be recognized and enforced as though no receiver had been appointed. And when the possession of the court is terminated and its final judgment entered, other courts are not affected by this possession of a receiver in considering the rights of persons not parties to the litigation.

It is a little singular that in support of their position our learned adversaries cite the case of Buck v. Colbath, 3 Wall. 334 (Br. 11), stating that it was a case where a United States Marshal was sued in trespass for taking the goods of a third person under a writ of attachment. He pleaded the authority of his writ, etc. But counsel overlook the statement of Mr. Justice Miller in deciding that case, at p. 342, as follows:

"It is only while the property is in the possession of the court, either actual or constructive, that the court is bound, or professes, to protect that possession from the process of other courts. Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights required them to take possession of the property or not. . . . It is upon this ground that the court, in Day v. Gallup (2 Wall. 97), held that this court had no juisdiction of that case. The property attached had been sold, and the attachment suit ended, when the attaching officer and his assistants were sued, and we held that such a suit in the State court, commenced after the proceedings in the Federal court had been concluded, raised no question for the jurisdiction of this court."

But it is urged by our adversaries that there was no existing lien for the security of the bonds in controversy at the time of the appointment of the receiver. That was a mixed question of law and fact which the Supreme Court of Ohio decided adversely to the plaintiff in error. Precisely the same question arose in the case of Dupasseur v. Rochereau, *supra*. The appellant in that case claimed that the lien of the appellee was subsequent and not prior to the mortgage of the appellant and, under the law of Louisiana, that it was, therefore, extinguished by the judgment in the Circuit Court of the United States. Say the court in its opinion, on page 138:

"Now that is the very point in dispute. Rochereau insists that by the non-inscription of the Jacobs mortgage within ten years it lost its rank, and became the subsequent and not the prior mortgage. Grant that Rochereau was the subsequent mortgagee, and all that the appellant claims would necessarily follow. But that point is not granted; on the contrary it is the very matter in dispute, and on this vital point we think that Rochereau was not concluded by the judgment of the Circuit Court, because he was not a party to it. Therefore the State court, in not regarding the decision of the Circuit Court as decisive of that question, did not refuse to that decision its due and legal effect."

In like manner the Supreme Court of Ohio decided, as we have already shown, that the lien of the Parkhurst mortgage to secure the bonds in controversy arose long prior to the commencement of the foreclosure suit in the Federal court, or to the appointment of the receiver in that case. And, in not regarding the decision of the Federal court as decisive of that question, it did not refuse to that decision its due and legal effect; and its determination presents no Federal question for the consideration of this court.

Our adversaries have considerable to say in their brief about the several consolidations of the mortgagor with other companies, as affecting a revocation of the authority that B. E. Smith originally had, when they were placed in his possession, to sell the bonds in question.

But this proceeds upon a misconception of the case presented by this record. Nobody, so far as we are aware, has ever contended that Smith was acting as agent for either of the companies when he sold these bonds in 1875; and no one has ever claimed that the bonds were issued by the mortgagor or its successor in 1875. No other delivery by the maker was necessary than that made when they were placed in the custody of Smith. The claim made by the plaintiff below, and the decision upon it by the Supreme Court of Ohio, is thus stated by that court (R. 57):

"Where this class of paper, complete in form and transmissible by delivery, is placed by the maker or owner in the custody of one who is thereby clothed with apparent power of disposition, and the custodian avails himself of the opportunity thus afforded him to negotiate it to an innocent party, the title of the holder is not to be tested by principles applicable to stolen securities, but by principles properly applicable to the transaction as it actually occurred. That the title to negotiable securities may pass by virtue of such a transaction as the finding of fact shows occurred in respect to the negotiation of the bonds in question is, we think, clear upon principle and sustained by authority. Railway Co. v. Sprague, 103 U. S. 756. Fearing v. Clark, 16 Gray, 74."

Professor Ames, in his recent work, Cases on Bills and Notes, Vol. II, page 865, states the doctrine upon this subject, as applicable to the case at bar, as follows:

"But one who has signed a bill or note will not always

be permitted to rely upon the absence of such delivery in order to defeat the title of a purchaser for value without notice; *e. g.*, the title of such a purchaser is unimpeachable, although the paper was delivered to a third person as an escrow, and afterward wrongfully delivered by him to the payee before condition performed. (Fearing v. Clark, 16 Gray, 74.)"

Bigelow, Chief Justice, speaking for the Supreme Court of Massachusetts, in the case of Fearing v. Clark, *supra*, says:

"It is undoubtedly true that, as between the original parties to a note, or those who took it with notice, it is essential that there should have been a delivery of the note by the maker to take effect as a contract. In this sense, delivery is included in the allegation of making. But the rule is qualified and limited as between the maker and a *bona fide* holder. In such case a valid delivery can be made by any person to whom the maker has given the note in such form as to enable him to hold himself out as absolute owner of the note."

See also

Worcester County Bank v. Dorchester Bank, 10 Cush. (64 Mass.) 488.

Kinyon v. Wohlford, 17 Minn. 239.

Jones on Railroad Securities, Sec. 210.

IV.

The doctrine of *lis pendens* has no application to commercial paper. Our adversaries, who admit that this is true, assert that while they may concede that Charles R. Lynde, as an innocent holder, for value, could recover upon the bonds in an action at law, that it does not follow that the mortgage is in like manner exempt from the application of the doctrine of *lis pendens*.

We suppose that it will not be claimed that a purchaser at a judicial sale takes any better title than was possessed by the parties to the litigation. And we do not understand that the case of Carpenter v. Longan and the subsequent cases cited under our Fourth point admit of the construction that is sought to be given to them. On the contrary, we suppose that those cases have finally settled that a mortgage, or deed of trust in the nature of a mortgage, to secure negotiable bonds is merely incident to the bonds, and partakes of the negotiability of its principal, viz., of the bonds themselves. It surely can not be necessary for us to argue this point in this court, in view of the decisions to which we have referred. The proposition is concisely stated in the opinion of this court by Mr. Justice Harlan, in Railway Co. v. Merchants' Bank, 136 U. S. at p. 283.

"When a note secured by a mortgage is transferred to a *bona fide* holder for value, before maturity, and a bill is filed to foreclose the mortgage, no other or further defenses are allowed against the mortgage than would be allowed were the action brought in a court of law upon the note."

The Supreme Court of Ohio, which held otherwise in the case of Bailey v. Smith, 14 O. S. 396, followed the decisions of this court in the cases cited in respect to a railroad mortgage made to a trustee to secure the negotiable bonds of a railroad company. This ruling of the Supreme Court of Ohio raises no Federal question; but, if it did, its determination is in accordance with the settled doctrine of this court.

V.

As to the questions whether the delivery of the bonds by the maker, in 1864, to B. E. Smith, for a specific purpose, was a sufficient delivery to validate them in the hands of a bona fide purchaser for value; whether the bonds from that time had a legal existence as contractual obligations; whether the company was estopped to deny their validity from that date; whether Mr. Lynde was estopped by failure to institute proceedings of any kind upon his bonds at an earlier date; whether the litigants in the Federal court were negligent in not requiring these bonds to be surrendered by Smith; these and all other questions discussed by our learned adversaries do not seem to us to present any Federal question, but, on the contrary, they are concluded by the judgment of the Supreme Court of Ohio. B. E. Smith's possession of the bonds at the time when he sold them as his own was precisely that of the President of the railway company in Railway Co. v. Sprague, 103 U. S. as stated at p. 760.

VI.

And finally, it seems to us that the fragment of the decree of the Federal court, recited in the 28th Finding of Fact (R. 36), having expressly provided that

"the said property should be sold subject to the outstanding sectional bonds prior in lien to the mortgage to said Roosevelt and Fosdick . . . and that nothing in said decree contained should in any manner affect, prejudice or preclude the holders of said paramount liens, or any of them, but that said decree should be without prejudice to the right of them, and each of them,"

it follows that said decree in no manner affected the right of Charles R. Lynde, as a holder of bonds secured by the Parkhurst mortgage, in an action to foreclose that mortgage.

Our adversaries recite the further language of said decree,

"That the purchaser of said mortgaged premises should hold, possess and enjoy the same, and all the rights, privileges and franchises appertaining, as fully and completely as the said C. C. & I. C. Ry. Co., at the commencement of said suit, held, or now holds and enjoys, or is entitled to hold or enjoy the same, but free from the liens then represented by any party to said cause. . . . And that thereby the defendants in said suits, respectively, and all persons claiming or to claim under them, or any of them, subsequent to the beginning of said suits by the said Roosevelt and Fosdick as purchasers, incumbrancers, or otherwise howsoever, should be, and that they thereby were forever barred and foreclosed of and from all right, etc., in or to the premises and property so sold."

Surely the language of these two provisions is consistent and can leave no doubt that the Circuit Court of the United States provided that its decree in that case should forever bar all parties and their privies in that case, and that it should not, in any wise, affect the bonds, or mortgages to secure the same, that were senior to the mortgages that were being foreclosed, and that were not represented by any parties in that litigation.

This was the construction placed upon the decree of the United States Circuit Court by the Supreme Court of Ohio. And we submit that that court rightly held that such a decree furnished no defense to this action by the executor of Charles R. Lynde.

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